In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1152

WILLIAM ARTEMIS AND MICHAEL RAIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that they were denied their right to a speedy trial; (2) that the government should have disclosed one month before trial the identities and previous statements of two informant-witnesses; (3) that the government knowingly permitted false testimony to be submitted to the jury; (4) that a government witness improperly testified that an informant had "passed" a polygraph examination; (5) that testimony about a second stolen painting was inadmissible; (6) that the imposition of consecutive sentences for conspiracy and the substantive offense denied them due process of law.

After a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of conspiracy to transport a stolen van

Gogh painting in interstate commerce, in violation of 18 U.S.C. 371, and of the substantive offense of transporting the painting, in violation of 18 U.S.C. 2314 and 2. Each was sentenced to a term of five years' imprisonment on the conspiracy count and to a term of ten years' probation on the substantive count, the probation to run consecutively to the imprisonment. The court of appeals affirmed (Pet. App.).

The evidence at trial disclosed that in early April 1972 petitioners and John Soares met at the Soares' home and planned the theft of some paintings, possibly including a Rembrandt, from a San Diego art museum. They planned to transport these paintings to Las Vegas, where petitioner Raife said he had a potential buyer (Tr. 271-274). On April 14, 1972, John and Kathleen Soares[1] met in San Diego, California, with the attorney of John Ray (who was incarcerated on an unrelated charge) and arranged bail for him (Tr. 275). After posting Ray's bond, the Soares went to Balboa Park in San Diego and met petitioners (Tr. 276-278, 386-387, 389).

That same day, after planning the mechanics of the theft, petitioners and John Soares entered the San Diego Fine Arts Museum while Mrs. Soares waited in her automobile parked nearby (Tr. 279-281, 361-362). John Soares returned from the museum with a van Gogh painting, valued at approximately $80,000, concealed under his shirt (Tr. 281, 380, 438). The Soares, who left in their own car, took the painting to the home of Rudolph and Carol Navarro and left it with Carol (Tr. 282-283).

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[1]In addition to petitioners, the indictment named John and Kathleen Soares and Rudolph and Carol Navarro. The cases of John and Kathleen Soares were severed prior to trial (Tr. 68-69, 82). John Soares later pleaded guilty to the conspiracy charge. The charges against Kathleen Soares, who testified for the government, were dismissed after the trial (Tr. 791-792).

The court granted Carol Navarro's motion for judgment of acquittal at the close of the government's case (Tr. 623). Rudolph Navarro was found guilty of conspiracy and of aiding and abetting the interstate transportation of stolen property (Tr. 780). His conviction has been affirmed on appeal (Pet. App.), and he has not sought certiorari.

After the theft petitioners met John Ray at a coffee shop in San Diego (Tr. 111-112). Petitioners and Ray then drove in petitioner Artemis's car to the Soares' home (Tr. 117). During this trip, petitioner Raife disclosed to Ray that they had just stolen a van Gogh from the "Balboa Art Museum"[2] (Tr. 118). At the Soares' home, petitioners and John Soares agreed to sell the painting; Raife suggested that he knew a "buyer" in Las Vegas, Nevada, who would take the painting (Tr. 120).

Petitioners and Ray then drove Artemis's car to Rudy Navarro's home and retrieved the van Gogh and another painting,[3] which they placed in the trunk of the car. The three drove to Las Vegas (Tr. 121-123, 151). A few days after they arrived in Las Vegas, Ray spoke with Special Agent Ian MacAulay of the Bureau of Alcohol, Tobacco and Firearms, for whom he had been an informant. MacAulay instructed Ray to tell petitioners that he had located an alternate buyer (Tr. 153-155, 491-492). Ray arranged a meeting between petitioners and the alleged buyer, Special Agent Riggs, who posed as a Texas art dealer (Tr. 154-160, 495-496). A price of $22,000 was agreed upon for the van Gogh. Riggs also expressed a desire to purchase the other painting, but petitioner Artemis said it would not be for sale until its value had been determined.

1. Petitioners contend that the delay between their offense and their trial denied them their rights to a speedy trial and to due process of law. However, whether this case is evaluated under the standards of *Barker* v. *Wingo*, 407 U.S. 514, or those of *United States* v. *Marion*, 404 U.S. 307, petitioners' claim is unpersuasive.

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[2]The San Diego Fine Arts Museum is located in Balboa Park.

[3]This was a painting by Forabosco that John Soares had stolen earlier and had stored at the Navarro home (Tr. 290-294).

Petitioners' crimes took place during April 1972. They were arrested on April 24, 1972, and initially indicted in Nevada on May 9, 1972. This indictment charged that petitioners sold the stolen van Gogh, which had been transported in interstate commerce, in violation of 18 U.S.C. 2315. It did not allege that petitioners participated in the theft or the transportation. After a series of pretrial maneuvers by petitioners, and as the case was about to go to trial, petitioner Artemis entered a plea of guilty (Tr. 11-12). However, we have been informed by the United States Attorney that the judge scheduled to hear the case in Nevada expressed doubt about the government's ability to prove the interstate element of the offense and permitted Artemis to withdraw his plea. On February 28, 1973, before a jury was impaneled, the government dismissed the indictment without prejudice, pursuant to Fed. R. Crim. P. 48(a).

Several months of additional investigation followed, and the government discovered for the first time that petitioners were involved in the theft as well as the interstate transportation. A second indictment was returned on July 19, 1973, in California, the locus of the theft. This indictment charged not only petitioners but also the Soares and the Navarros, added a conspiracy count, and charged interstate transportation of stolen goods (18 U.S.C. 2314) rather than sale of stolen goods that had been transported interstate (18 U.S.C. 2315). After the district court had disposed of "[a]n abundance of pretrial motions" (Pet. 9), trial commenced on November 13, 1973, approximately one and one-half years after the crime.

Petitioners apparently urge that the delay was prejudicial because the passage of time diminished the opportunity to prove an alibi (Pet. 53-54). This claim is unsupported; petitioners do not point to any witness who was lost and do not claim that any memories faded. Indeed, their immediate arrest and initial indictment alerted them to the necessity of developing their defense and obtaining corroborative testimony.

We submit that most of the delay should appropriately be treated as pre-indictment delay under *Marion*; the charges in the second indictment are not the same as those of the earlier indictment. Petitioners have not alleged that the government unduly postponed the prosecution for the purpose of gaining an advantage over them, and have, therefore, failed to make the showing *Marion* requires. But even if petitioners' contention is assessed under the *Barker* speedy trial standards, it is unavailing because petitioners have not shown prejudice, because a substantial portion of the delay was necessary to resolve pretrial motions, and because most of the remaining delay was justified by the need for additional investigation.

2. Petitioners contend (Pet. 55-61) that the prosecution should have disclosed, a month prior to trial, the identities and statements of two witnesses, John Ray and Kathleen Soares.[4] Petitioners do not urge, however, nor does the record reflect, that the government withheld exculpatory evidence. Indeed, John Ray and Kathleen Soares were the principal government witnesses and implicated rather than exonerated petitioners. Since both informants testified at trial and were subject to cross-examination, and no exculpatory evidence was withheld, petitioners' reliance upon *Roviaro* v. *United States*, 353 U.S. 53, and *Brady* v. *Maryland*, 373 U.S. 83, is misplaced. Both of those cases involved information that was never made available, even during trial.

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[4]One month prior to trial, the prosecution refused to disclose three statements of the informants and a summary of those statements, as well as their identity, present location, and "impeachment" material possessed by it (Tr. 37). The prosecution informed the court that these statements contained no exculpatory evidence and that the persons who gave them would be called as witnesses (Tr. 36-37). Upon the government's disclosure that one of the informants had been approached by an unnamed individual and feared for his safety, the court authorized the government to withhold the information at that time (Tr. 38-39).

In any event, the government made available to the defense extensive information well in advance of trial, and made available the statements of Ray and Soares one and one-half days prior to trial. In these circumstances, the court properly denied petitioners' initial motion for earlier discovery which, in view of the provisions of the Jencks Act permitting discovery or production of a government witness's statement only after the witness has testified (18 U.S.C. 3500), it had no power to grant.

3. Petitioners' contention that the government knowingly allowed perjured testimony to be submitted to the jury without correction (Pet. 62-69) is without support in the record. Ray initially testified that no one had discussed with him an early release from prison on a drug charge in exchange for his cooperation. He also denied having received compensation for his services as an informer, and he denied discussing the instant case with Agent MacAulay during a visit at Terminal Island (Tr. 205-206, 247, 250).

Immediately after learning from Agent MacAulay that Ray had testified falsely, the government put MacAulay on the stand to correct Ray's testimony (Tr. 501, 529-530, 553, 556).[5] The government did not engage in "gamemanship," as petitioners contend (Pet. 69). Agent MacAulay, on direct examination by government counsel, expressly repudiated Ray's statement that he had not received compensation from the government (Tr. 501). MacAulay also testified, contrary to Ray's version of the facts, that he had interceded on Ray's behalf to obtain his early release from prison on the drug conviction (*ibid.*).

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[5]Without support for their assertion, petitioners also contend that government counsel was fully aware that Ray was testifying falsely while he was on the stand and that no action was taken when Agent MacAulay, whom the court had authorized to remain in the courtroom during the trial, informed the attorney that Ray had lied (Pet. 64-67). The record (as discussed in the text at pages 6-7) demonstrates the contrary and reflects decisive action by the government attorney as soon as he learned false testimony had been given.

Petitioners' statement that "[t]he balance of Ray's perjured testimony had to be developed by cross-examination" (Pet. 65) asserts more than the record supports. Although the government did not question MacAulay on direct examination about his discussion of the case with Ray at Terminal Island,[6] MacAulay, on cross-examination, expressly rejected Ray's version of the meeting (Tr. 529-530). The remainder of Ray's incorrect testimony had been corrected on direct examination of MacAulay. In light of the effort by the government to correct two aspects of Ray's testimony and the fact that Ray also testified as a witness for the defense, it is unreasonable to characterize this omission, as petitioners do (Pet. 67-69), as a knowing use of perjured testimony. All incorrect assertions in Ray's testimony were completely exposed to the jury. Nothing would be introduced at the second trial sought by petitioners that was not introduced at the trial they have already had.

4. Agent MacAulay, during cross-examination, volunteered that he believed Ray because Ray had "passed" a polygraph examination. This remark was inappropriate and unresponsive, but the error was cured by the court's prompt cautionary instruction (Tr. 513-514). Moreover, in light of the overwhelming evidence against petitioners, the improper testimony was harmless.

5. Some testimony during trial pertained to a stolen Forabosco painting, which had been stored at the Navarros' house and was transported (with the van Gogh) by petitioners to Nevada. This testimony was admissible. As the court of appeals correctly stated (Pet. App.):

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[6]The record does not disclose that Agent MacAulay brought this particular discrepancy to the attention of the Assistant United States Attorney (Tr. 529-530, 553, 556).

The conspiracy was active at the time Mrs. Soares said that her husband told her that the stolen Van Gogh could be stored with the Forabosco in Navarro's home. The reference to the Forabosco was not an allusion to an unconnected crime; rather, the context in which it was made indicates that it was a statement made in the course of and in furtherance of the conspiracy to hide the Van Gogh anteceding its transportation and ultimate sale. (*United States* v. *Roselli* (9th Cir. 1970) 432 F.2d 879.) The two paintings were stored together and transported together with the active assistance of all of these appellants. After the theft of the Van Gogh, the history of the two paintings and the parts that each appellant played with respect to both could not practically be separated. (Cf. *Hernandez* v. *United States* (9th Cir. 1966) 370 F.2d 171; *Armstrong* v. *United States* (9th Cir. 1964) 327 F.2d 189.)

6. Petitioners finally assert (Pet. 91-93) that it was improper to impose consecutive sentences for the conspiracy and the substantive offense. As this Court recently has reiterated, however, the law of conspiracy is directed against evils separate from those accompanying the substantive crime, and separate punishments are permitted. *Iannelli* v. *United States*, No. 73-64, decided March 25, 1975.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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